

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: OTHMAN, C.J., RUTAKANGWA, J.A., And LUANDA, J.A.)**

**CIVIL APPLICATION NO. 3 OF 2008**

**JOHN TILITO KISOKA .....APPLICANT  
VERSUS**

**ALOYCE ABDUL MINJA .....RESPONDENT**

**(Application for extension of time for leave to appeal from the judgement of  
the High Court of Tanzania at Moshi)**

**(Jundu, J.)**

**Dated 28<sup>th</sup> day of April, 2006**

**In**

**Civil Appeal No. 38 of 2003**

**RULING OF THE COURT**

**7<sup>th</sup>&15<sup>th</sup> November, 2011**

**RUTAKANGWA, J.A.:**

The applicant's appeal in the High Court at Moshi was dismissed by Jundu, J. (as he then was) on 28<sup>th</sup> April, 2006. He was aggrieved and resolved to prefer an appeal to this Court. As that would have been a second appeal, he had to obtain leave to appeal in terms of section 5 (1) (c) of the

Appellate Jurisdiction Act, Cap 141 (the Act) read together with Rules 43 and 44 of the then Tanzania Court of Appeal Rules, 1979 (the Rules).

Rule 43 of the Rules provided as follows in paragraph (a) thereof:-

*"43. In Civil matters-*

*(a) Where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within fourteen days of the decision".*

As neither the appellant (now applicant) nor his learned advocate, Mr. Peter Jonathan, were present in court on 28<sup>th</sup> April, 2006, no informal application for leave could be made. They had, therefore, to make a formal application within fourteen days.

For reasons which are not immediately relevant for the purpose of this ruling, the applicant failed to file the said application within the prescribed period. He accordingly lodged Misc. Civil Application No. 39 of

2006 in the High Court. He was seeking two main reliefs. One, extension of time to apply for leave to appeal. Two, leave to appeal. The applications were refused by the High Court and hence this application seeking the same two reliefs.

This application by notice of motion is supported by the affidavits of Mr. Peter Jonathan and Mr. John T. Kisoka (the applicant). The applicant has attempted to explain why he was late in lodging his application for leave to appeal. The explanation found in the two affidavits did not impress the respondent who lodged an affidavit in reply countering the same. All the same, having carefully read the affidavit of Mr. Jonathan, we have gleaned therefrom one basic reason which would justify the grant of the prayers sought in the notice of motion. It is found in paragraph 17 (c).

The said sub-paragraph reads thus:-

*"17 In the intended appeal it will be contended that the judgement of the High Court is impugnable on the following grounds:*

(a)...

(b)...

*(c) That the learned judge erred on a point of law in holding that the suit was res-judicata and otherwise incompetent for lack of leave without giving the Applicant/Appellant an opportunity to be heard..."*

When the application was called on for hearing, the applicant was present in person as well as Mr. Jonathan. The respondent was also present but fending for himself.

In his brief submission, Mr. Jonathan pressed us to grant the two orders being sought, because when extension of time for leave to appeal is sought on the ground of illegality or otherwise of the impugned decision, then extension of time or leave to appeal ought to be granted as a matter of right. In this case, he stressed, the impugned judgement of the High Court is tainted with illegality since it rested on an issue raised by the learned judge on his motion while composing the judgement and the

parties were never given any opportunity to be heard on it. In short, he emphasized, the appellant/applicant was condemned unheard. To him this constituted sufficient reason to grant the sought extension of time and leave to appeal.

The respondent, being a lay person, did not address us on this crucial legal issue. After appealing to the Court's sympathy, for the dispute has been dragging in the courts for almost 35 years, he left the matter entirely in the discretion of the Court.

To start with, we wish to associate ourselves fully with the sentiments of Mr. Jonathan that, Civil Appeal No. 30 of 2003 in the High Court at Moshi, between the parties herein was decided solely on the basis of an issue which the parties therein were not heard on. This is patently clear from the judgement itself. The learned first appellate judge made it clear that he had decided to jettison to the winds the grounds of appeal and the parties' submissions because, to him, the case was incompetent from beginning on account of being res judicata. He accordingly, on his own motion, ruled that the trial District Court had no jurisdiction to entertain the case in the first place. He then struck out the appeal with

costs. There is no dispute, therefore, that the applicant was condemned unheard by the learned first appellate judge.

But does the undisputed fact that the appellant/applicant was condemned unheard constitute sufficient reason for extending the time to apply for leave to appeal and for the grant of leave to appeal against that judgment? Our considered answer to this pertinent question is in the affirmative. We find firm support for this answer in the case of **PROPERTY & REVISIONARY INVESTMENT CORPORATION LTD V. TEMPER & ANOTHER** (1978)2 All E.R. 433. It was held therein that in applications of this nature, among the factors to be considered by the court were **special circumstances** showing why the applicant should be given extension of time. This reasoning was adopted by this Court and followed in the cases of **CITIBANK ( TANZANIA) LTD V T.T.C.L. & OTHERS**, Civil Application No. 97 of 2003, **WILLIAM MALABA BUTABUTEMI V.R, MZA** Criminal Application No. 5 of 2005, **VERONICA FUBILE V. N.I.C. & TWO OTHERS**, Civil Application No. 168 of 2008 and **JOSEPHINA A. KALALU V. ISAAC M. MALLYA**, Civil Reference No. 1 of 2010 (all unreported), among others.

In **CITIBANK (TANZANIA) LTD V. T.T.C.L.** (supra), the Court held that there were many and varied special circumstances, which such an applicant can show. One such circumstance, the Court said, is:

*"...a claim of illegality or otherwise of the challenged decision or order or in the proceedings leading to the decision."*

In that case, the applicant had been condemned unheard by the High Court. The Court found that breach of one of the cardinal principles of natural justice to be so fundamental that it rendered the decision arrived at illegal. Extension of time was granted.

In another case referred to us by Mr. Jonathan, of **PRINCIPAL SECRETARY, MINISTRY OF DEFENCE & NATIONAL SERVICE V. DEVRAM P. VALAMBHIA**, [1992] T.L.R. 387, the Court succinctly held that "where a point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute sufficient reason within rule 8 of the Court of Appeal Rules to

overlook non-compliance with the requirements of the Rules and to enlarge the time for such non-compliance". See also **KALUNGA AND COMPANY, ADVOCATES V.N.B.C. LTD** (2006) **T.L.R 235**, wherein, as we, the judge raised on issue *suo mob* and made a decision without the parties concerned being heard upon it.

In the light of the clear position of the law on the issue, we are enjoined to hold that the applicant has demonstrated sufficient reason for the grant of the two orders being sought in this application. A claim of being condemned unheard is of such grave importance as to constitute sufficient reason within rule 8 of the Rules. We accordingly, retrospectively, grant the applicant extension of time to apply for leave to appeal against the impugned High Court decision, from 4<sup>th</sup> August, 2008 when this application was lodged.

As the respondent has impressed upon us and we are in agreement with him, this is a long standing dispute. Justice demands that it must be

resolved through adjudication as expeditiously as possible. Since there is a claim of illegality in the High Court's judgment, we proceed to grant the applicant the leave to appeal sought in this application. Costs of this application to be in the cause.

It is so ordered.

**DATED** at **ARUSHA** this 12<sup>th</sup> day of November, 2011.

M. C. OTHMAN  
**CHIEF JUSTICE**

E. M. K. RUTAKANGWA  
**JUSTICE OF APPEAL**

B. M. LUANDA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

  
Z. A. Maruma  
**DEPUTY REGISTRAR**